

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

D-042
RULING ON MOTION
FOR ADDITIONAL CONTINUANCE

26 June 2008

The Defense has moved for an additional continuance of the scheduled trial date from 21 July to 22 September, a period of nine weeks. The rationale for the request is that the Supreme Court's recent decision in *Boumediene v. Bush*, 533 U.S. ___, (2008) raises the prospect that the constitution may protect detainees at Guantanamo Bay more broadly than has been realized. The Defense seeks additional time to research and file new motions, and to permit the Commission to reconsider rulings that relied in whole or in part on the opinion of the D.C. Circuit Court of Appeals, *Boumediene v. Bush*, 476 F. 3d 981 (D.C. Cir. 2007).

The Government opposes the motion, pointing to the fact that the Commission has already granted a continuance that will allow five weeks to consider the impact of the Supreme Court's new decision, and noting the Court's extremely narrow holding, which reversed the Court of Appeals' determination that the Suspensions Clause was inapplicable. "Our decision today holds only that the petitioners before us are entitled to the writ; that the DTA review procedures are an inadequate substitute for habeas corpus; and that the petitioners in these cases need not exhaust the review procedures in the Court of Appeals before proceeding with their habeas actions in the District Court. The only law we identify as unconstitutional is MCA §7, 28 U. S. C. A. §2241 (e) (Supp. 2007). *Boumediene v. Bush*, 533 U.S. ___, slip op. at 66 (2008).

ANALYSIS

It is well settled that a Military Judge may grant a continuance for as long and as often as may be required in the interests of justice. In granting the Defense request for continuance from 27 May to 23 July, the Commission acknowledged that the Court's opinion might require a wholesale rescheduling of the proceedings. That possibility was envisioned should the Supreme Court issue a broad declaration that the constitution and all of its provisions did indeed apply in Guantanamo Bay. But the Court's holding was more limited and narrow, and clearly based upon the most unusual circumstances that led to it, i.e. that the petitioners had been held for up to six years without being charged, that they continued to deny that they were unlawful combatants or associated with al-Qaeda, and that the DTA procedures in place gave them no reasonable prospect of timely review of their detention. It is not clear, and the Court did not hold, that any other provision of the constitution will protect the detainees at Guantanamo Bay. The more relevant portion of the Commission's 16 May ruling is the declaration that the Commission "expects the parties to continue to work towards [the current trial] dates."

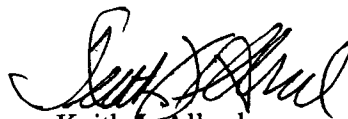
The parties have already briefed, and the Commission has decided, a number of issues that involve the applicability of the constitution to detainees in Guantanamo Bay, and which relied on a decision that has now been overruled, at least in part. It is altogether proper that these

decisions be reviewed for compliance with the Court's new guidance. It is not clear, however, that the Defense should require an additional nine weeks to brief and file motions that it should arguably have anticipated, researched and filed during the course of the past year, each of which might well have raised the issues the Defense now declares an intention to raise, and argued that the constitution should guarantee these protections. The Defense was aware on 16 May that the case had been continued precisely because the applicability of the constitution was yet at issue, and was instructed to work towards the 21 July trial date. The Commission is not inclined now to continue the case to permit additional research by the Defense.

Faced with the Defense's list of intended motions, however, the Government opposes any continuance, even as it acknowledges the logistical and other burdens of orchestrating the travel of twenty two government witnesses to Cuba for trial. The Government seems confident that all the remaining matters can be resolved within the one week now set aside for motions, and that the trial may follow immediately thereafter. In opposing the continuance, the Government thus runs the risk that we will still be resolving pre-trial motions when the members and witnesses begin to arrive in Guantanamo Bay.

DECISION

The Defense has had ample time to raise the issues it now seeks additional time to raise. Indeed, the deadline for the filing of law motions passed months ago. The Motion for a continuance of the trial date until 22 September is DENIED. We will assemble in Guantanamo Bay on Monday, July 14th to litigate the remaining pretrial motions. Trial will follow as soon as the motions have been resolved, but not earlier than Monday the 21st of July. The Government accepts the possibility that resolution of the motions may delay the trial beyond that date. Motions for Reconsideration of rulings already issued, and new motions based on the Supreme Court's decision in *Boumediene* shall be filed not later than Wednesday July 2nd at close of business. Answers are due in accordance with current Rules of Court. In light of the compressed schedule, filings should be direct and to the point. The Commission is particularly interested in the parties' views on what principles govern whether other constitutional provisions, such as those the Defense intends to raise, apply in Guantanamo Bay?


Keith J. Allred
Captain, JAGC, USN
Military Judge